



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Collections Enforcement Section
Office 216.787.3030
Fax 216.787.3480

615 W. Superior Avenue, 11th Fl
Cleveland, Ohio 44113
www.OhioAttorneyGeneral.gov

BUSINESS CHAPTER 7 BEST PRACTICES

STATE DEBTS AND LIQUOR PERMITS

ALISON L. ARCHER, ASSISTANT ATTORNEY GENERAL
COLLECTIONS ENFORCEMENT SECTION
OHIO ATTORNEY GENERAL MIKE DEWINE
615 WEST SUPERIOR AVENUE, 11TH FLOOR
CLEVELAND, OHIO 44113
TELEPHONE: 216.787.3030
FACSIMILE: 866.416.9729
Email: Alison.Archer@ohioattorneygeneral.gov

NORTHERN DISTRICT OF OHIO BENCH BAR RETREAT

October 30, 2015

I. OVERVIEW

- A. State of Ohio is represented by the Ohio Attorney General’s Office (“AGO”).
- B. Debt delinquent more than 45 days is certified to the AGO for collection - O.R.C. § 131.02.
- C. AGO Collections Enforcement Section is section within AGO responsible for collection of State debt.
- D. The AGO collects debt for more than 200 State Departments, Boards, Commissions, Universities and Agencies.
- E. Certain Assistant Attorneys General within Collections Enforcement are tasked with representing the State of Ohio in U.S. Bankruptcy Courts in Ohio and nationwide.
- F. Our Bankruptcy Group includes 8 Assistant Attorneys General located in:

Columbus

Cleveland

Cincinnati

Toledo

Youngstown

- H. The AGO contracts with private attorneys who are appointed Special Counsel to represent the state in bankruptcy and collections cases.

Collections Enforcement Bankruptcy AAG'S Contact List

Cincinnati Office

Vicki Garry

1600 Carew Tower

441 Vine Street

Cincinnati, Ohio 45202

Direct Dial: 513-852-1536

Direct Fax: 866-449-7532

Main Line: 513-852-3497

Main Fax: 513-852-3484

Email: victoria.garry@ohioattorneygeneral.gov

Handles Cincinnati & Dayton Bankruptcy Courts

Columbus Office

150 East Gay Street, 21st Floor

Columbus, Ohio 43215

Main Line: 614-466-8360

Main Fax: 614-752-9070

Amy Kaufman

Direct Dial: 614-728-4324

Direct Fax: 866-523-8113

Email: amy.kaufman@ohioattorneygeneral.gov

Handles Columbus Bankruptcy Court

Donn Rosenblum

Direct Dial: 614-728-5754

Direct Fax: 877-591-5768

Email: donn.rosenblum@ohioattorneygeneral.gov

Handles Akron Bankruptcy Court

Cleveland Office

615 West Superior Avenue

Cleveland, Ohio 44113

Main Line: 216-787-3030

Main Fax: 216-787-3480

Alison Archer

Direct Line: 216-787-4721

Direct Fax: 866-416-9729

Email: alison.archer@ohioattorneygeneral.gov

Handles Cleveland Bankruptcy

Trish Lazich, Director, Bankruptcy & Legal Services

Direct Line: 216-787-3180

Direct Fax: 866-437-9074

Email: trish.lazich@ohioattorneygeneral.gov

Toledo Office

Robert L. Doty

One Government Center, Suite 1240

Toledo, Ohio 43604

Direct Dial: 419-327-4493

Direct Fax: 877-626-9294

Main Line: 419-245-2550

Main Fax: 419-245-2520

Email: robert.doty@ohioattorneygeneral.gov

Handles Toledo Bankruptcy Court

Youngstown Office

Jennifer Zap

20 West Federal Plaza, 3rd floor

Youngstown, Ohio 44503

Direct Dial: 330-884-7519

Direct Fax: 866-452-9893

Main Line: 330-884-7500

Main Fax: 330-884-7551

Email:

jennifer.zap@ohioattorneygeneral.gov

Handles Youngstown & Canton Bankruptcy Courts

1.27.15 updated

COMMON GOVERNMENT CLAIMS

1. Ohio Department of Taxation
 - Sales
 - Income – Personal & Employer Withholding
 - Use
 - Corporate franchise
 - Commercial activity
2. Ohio Bureau of Workers' Compensation
 - Premiums
 - Non-compliance claims
 - Self-insured assessments
 - Benefit overpayments
3. Ohio Department of Job & Family Services
 - Contributions
 - Benefit overpayments
 - Franchise fees/Medicaid payments
4. Student Debt from 40+ State Universities
 - Student loans
 - Tuition payments
 - Room & board
5. Ohio Lottery Commission
 - Proceeds from agent ticket sales
6. Ohio Department of Development
 - Loans

7. Ohio Supreme Court
 - Client security funds
 - Fines for noncompliance on Attorney CLEs/registration
 - Attorney Disciplinary fines
 - Unauthorized practice of law fines
8. Environmental Protection Agency
 - Fines/penalties for air emissions, water issues

LIQUOR PERMITS IN BANKRUPTCY

A. Ohio Law

1. Ohio Department of Commerce, Division of Liquor Control (“DLC”) is the governing body responsible for controlling the manufacture, distribution, licensing, regulation, and merchandising of beer, wine, mixed beverages, and spirituous liquor within Ohio pursuant to Ohio Revised Code Chapters 4301 and 4303. Regulatory functions include the issuance of permits to manufacturers, distributors and retailers of alcoholic beverages. As a “control state” all beer and intoxicating liquor must be bought and sold pursuant to Ohio law. DLC’s website is at <http://www.com.ohio.gov/liqr/> and has good information on how to transfer/renew liquor permits.
2. The Liquor Control Commission (“Commission”) is the governing body responsible for ensuring compliance with the liquor laws and regulations of the state of Ohio and to provide fair and impartial hearings for the protection of the public and liquor permit holders. See O.R.C. § 4301.022, et. seq. The Commission works in conjunction with the DLC and the Ohio Department of Public Safety Investigative Unit. The Commission’s website is at <http://www.lcc.ohio.gov/>.
3. Ohio law is clear that liquor permits are not property to which a security interest could attach. *Abraham v. Fioramonte* (1952), 158 Ohio St. 213, *Banc of America Strategic Solution, Inc. v. Cooker Restaurant Corp.*, Franklin App. No. 05AP-1126, 2006 Ohio 4567 (Ohio liquor permits may not be subject to a security interest).
4. Ohio law allows a liquor permit to be suspended or revoked for failure to pay any excise taxes – O.R.C. § 4301.25(A)(6).
5. Sales taxes are considered excise taxes – O.R.C. § 5739.02 as are BWC premiums, see *In re Suburban Motor Freight, Inc.*, *supra*. for purposes or O.R.C. §301.25(A)(6).

6. Ohio law further prohibits the transfer of a permit if there are outstanding sales or withholding taxes. Ohio law requires DLC to check with the Ohio Department of Taxation (“Taxation”) for delinquent sales and withholding taxes prior to transferring a permit. O.R.C. § 4303.26(B). DLC will not transfer a permit until it receives a “proceed letter” from Taxation.
7. The Commission can refuse to transfer or renew a liquor permit pursuant to O.R.C. § 4303.292 for failure to pay workers’ compensation premiums or non-compliance claims. 2004 Op. Attorney General No. 2004-026.
8. The Commission can refuse to transfer or renew a liquor permit pursuant to O.R.C. § 4303.292 for failure to pay unemployment contributions. 1990 Op. Attorney General No. 1990-052. Unemployment contributions are excise taxes. *State ex. rel., Youngstown Sheet & Tube v. Leach*, (1962) 173 Ohio St. 397.
9. Ohio law prohibits any entity other than the named permit holder to conduct business under the permit. O.R.C. § 4303.27. Therefore, management agreements to operate a business with a liquor permit between parties are not recognized by the State which must hold the permit holder (i.e. trustee) liable for all unremitted taxes and outstanding tax returns from the date of appointment (for trustees) through the date of actual transfer of the permit by DLC. The permit holder will further be responsible for any citations issued against the permit by DLC.
10. Ohio law allows an inactive permit be placed in safekeeping and is entitled to be renewed one time while in safekeeping. O.R.C. § 4303.272.
11. Ohio law requires annual renewal of a liquor permit. O.R.C. § 4303.271.

B. Federal Law

1. Bankruptcy law is clear that liquor permits are property of the bankruptcy estate to which security interests can attach. *In re Terwilliger’s Catering Plus, Inc.*, 911 F. 2d 1168 (6th Cir. 1990) held that a valid pre-petition IRS lien took priority over any pre-petition debt owed to the State of Ohio. Court characterized O.R.C. § 4303.26(B) as giving the State a security interest in a liquor permit at transfer.
2. *In re Shary*, 152 B.R. 724 (Bankr. N.D. Oh. 1993) held that the State’s failure to object to the sale motion or confirmation implicitly conveyed its consent to the sale pursuant to 11 U.S.C. § 363(f)(2). *Shary* further reinforced the notion that the State holds a security interest in the permit at the time of transfer as suggested by *Terwilliger’s, supra*.

C. Useful Information to Transfer a Permit

1. Trustee should place non-operating permits in safekeeping pursuant to O.R.C. § 4303.272 as soon as possible to avoid having to file monthly sales tax returns on the vendor's license related to the permit. See DLC website at <http://www.com.ohio.gov/liqr/>. If the permit is not placed in safekeeping and not being operated, the trustee must continue to file monthly sales tax returns.
- 2.
3. Trustee must ensure annual renewal application for liquor permit is timely filed and paid with the Ohio Department of Commerce, Division of Liquor Control. To determine when the renewal period is for a permit, go to : http://www.com.ohio.gov/documents/LIQR_RenewalDistricts.pdf
4. Taxation requires the filing of all pre-petition tax returns as well as filing and payment of all post-petition tax returns related to liquor permits in bankruptcy.
5. If permit is being operated during bankruptcy, Taxation will require affidavits from trustee to ensure that all sales and withholding taxes are being correctly reported, taxes remitted and returns filed.
6. Trustee must have court authority to sell permit and other business assets to a third party – Ohio administrative code prohibits selling a “bare” permit. O.A.C. § 4301:1-1-14. – “when such transfer is in connection with the bona fide sale of the business or personal property assets of such permit holder...”
7. The “value” of the liquor permit (the sale price) should be clearly listed in the motion and order/notice authorizing the sale.
8. Properly notice the State of Ohio taxing authorities on any pleadings related to the sale and transfer of a liquor permit to avoid potential transfer issues. See Ohio Law, *supra*, and Section VI, Notices in Bankruptcy, *infra*.

NOTICES IN BANKRUPTCY

A. 11 U.S.C. § 342 requires a debtor provide notice to creditors at an address used in the last two mailings received from the creditor in the 90 days prior to the petition date or at a designated address.

B. Federal Rule of Bankruptcy Procedure 5003(e) provides:

The United States or the state or territory in which the court is located may file a statement designating its mailing address. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

C. Ohio Rule of Civil Procedure 4.2(J) states that service of process shall be made as follows:

Upon this state or any one of its departments, offices and Institutions as define in division (C) of section 121.01 of the Ohio Revised Code, by serving the officer responsible for the administration of the department, officer or institution or by serving the attorney general of this state:

D. Designated addresses for the State of Ohio can be found on the U.S. Bankruptcy Court, Northern District of Ohio website at <http://www.ohnb.uscourts.gov/> These addresses have been updated to include service of §505 tax determination notices and constitutional challenges to state statutes.

<https://www.ohnb.uscourts.gov/federal-and-state-agencies-and-certain-taxing-authorities>

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Northern District of Ohio
 Pat E. Morgenstern-Clarren, Chief Judge • Kenneth J. Hirz, Clerk

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Federal and State Agencies and Certain Taxing Authorities

Federal Rule of Bankruptcy Procedure 5003(e) provides that:

"The United States or the state or territory in which the court is located may file a statement designating its mailing address. The United States, state, territory, or local government unit responsible for the collection of taxes within the district in which the case is pending may file a statement designating an address for service of requests under § 505 (b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found. ... The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law."

The following register of agencies has been provided to the U.S. Bankruptcy Court. Appropriate governmental officials may submit agency information for posting on the register, subject to approval of the Clerk. The Clerk shall publish a current register annually on each January 2nd.

- United States Agency Addresses
- State of Ohio Agency Addresses
- Taxing Authority Addresses

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UNITED STATES BANKRUPTCY COURT
Northern District of Ohio
 Pat E. Morgenstern-Clarren, Chief Judge • Kenneth J. Hirz, Clerk

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State of Ohio Agency Addresses
 State Agency Designations for Compliance with Rule 5003

Ohio Department of Medicaid
 Office of Legal Counsel
 P.O. Box 182709
 Columbus, OH 43218-2709
 (Use this designated address for any claims owed to Medicaid including but not limited to Medicaid providers.)

Ohio Dept of Taxation
 (Insert TINS here)
 Attn: Bankruptcy Division
 P.O. Box 530
 Columbus, Ohio 43216-0530
 (This address should also be used for section 505 tax determination requests for taxes assessed by the Ohio Department of Taxation.)

Ohio Bureau of Workers' Compensation
 (insert policy # or claim # here)
 Attn: Law Section Bankruptcy Unit
 P.O. Box 15567
 Columbus, Ohio 43215-0567
 (This address should also be used for section 505 tax determination requests for premiums assessed by the Ohio Bureau of Workers' Compensation.)

Ohio Department of Job & Family Services
 (insert employer # or claim # here)
 Attn: Program Services/Revenue Recovery
 P.O. Box 182404
 Columbus, Ohio 43218-2404
 (This address is to be used for any ODJFS debt such as unemployment tax contributions or benefit overpayment claims. Medicaid debt has a separate address.)

https://www.ohnb.uscourts.gov/state-ohio-agency-addresses

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Miami University
 Attn: M.W. Dale
 301 S. Campus Avenue
 Oxford, Ohio 45056-3439

Sinclair Community College
 Bursar's Office Room 10244
 444 West Third Street
 Dayton, Ohio 45402

Youngstown State University
 c/o Office of Student Accounts
 One University Plaza
 Youngstown, Ohio 44555

Ohio Lottery Commission
 615 West Superior Avenue, 4th floor
 Attn: Legal/Bankruptcy
 Cleveland, Ohio 44113
 (Also notice the Ohio Attorney General's Office at the address listed in this register.)

Eastern Gateway Community College
 4000 Sunset Blvd
 Steubenville, Ohio 43953

Rio Grande Community College
 P.O. Box 326
 Rio Grande, Ohio 45674

Because the provisions of Ohio Rev. Code § 131.02 require delinquent debt owed to State agencies, departments and bureaus be certified to the Ohio Attorney General's Office for collection, it is recommended that in addition to noticing the specific state entity, the following "also notify" listing should be included under each scheduled debt owed to the State of Ohio, including but not limited to Taxation, BWC, ODJFS, The Ohio State University Medical Center, Ohio Lottery Commission, Ohio Development Services Agency, and all state universities and colleges:

(insert name of creditor)
 c/o Attorney General
 Collection Enforcement Section
 Attn: Bankruptcy Staff
 150 E. Gay Street, 21st floor
 Columbus, Ohio 43215

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- E. It is strongly recommended that you use the addresses as listed on the Northern District website when preparing the Debtor's schedule and petition in order to provide proper notice to the State creditors. This is particularly important as all of the State of Ohio taxing authorities (Taxation, BWC & ODFJS) file their own proofs of claims in bankruptcy cases.
- F. Most of the State of Ohio taxing authorities are currently using or will be using the Electronic Bankruptcy Noticing process to receive notices and other pleadings disseminated by the Court; Debtor's use of the designated addresses will facilitate that process.
- G. Common **mistakes on notice** include:
 - 1. Using post office box for personal income tax returns as address for Taxation— not advisable anytime of the year but particularly not during tax season.
 - 2. Using district office addresses for any taxing authorities.
 - 3. Noticing the Ohio Attorney General or outside counsel but not the actual taxing authority. Failure to notice the actual taxing authority may result in a nondischargeable debt not being proofed or paid.
 - 4. Not using the State designated addresses on the bankruptcy court websites or not calling our office when you have a question on noticing a state creditor – JUST ASK to avoid later explaining to your client why the debt is either now not discharged for failure to properly notice the State creditor or why the non-dischargeable debt was not paid through the bankruptcy.

363 Sale Issues

1. Sales of property “free & clear” pursuant to § 363(f) does not extinguish the debtor’s experience rating for unemployment contributions which can be used to determine the purchaser’s unemployment contribution rate pursuant to State law. *In re Wolverine Radio Company*, 930 F.2d. 1132 (6th Cir. 1991).
2. Debtor’s unemployment experience rate is not a claim, debt or interest that can be extinguished by § 363(f), *Id.* at 1145-1146.
3. Michigan unemployment system certified as complying with requirements of Federal Unemployment Tax Act for experience based tax rate and as part of a comprehensive federal-state system provides for security of unemployed workers does not conflict with federal bankruptcy law. *Id.* at 1146.
4. Bankruptcy Code should not provide purchaser with a more preferable tax rate than employers who purchase the assets of a predecessor not in bankruptcy. *Id.* At 1149.